SYKT. BUMIPUTRA KIMANIS

v.

TAN KOK VOON

HIGH COURT, BRUNEI
GERALD GODFREY JC
[SUIT NO. 182 OF 1987]
29 JUNE 1988

CIVIL PROCEDURE: *Application under inherent jurisdiction of Court - Action be stayed - Forum non conveniens - Court is not the natural and appropriate forum for the trial - Principles applied for stay - Law of England whether applicable in Brunei.*

The plaintiff is a Malaysian firm holding a licence from the Brunei government to extract stand and coral stones from the sea off Petagas, Penampang, Sabah, Malaysia. The defendant resides and carries on business in Brunei as the sole proprietor of a shipping and trading company. A dispute between the plaintiff and the defendant arose out of an agreement, pursuant to which, the plaintiff filed a suit against the defendant in Brunei. The pleadings in the action are closed and there are no further procedural steps which have to be taken before the trial. The defendant now makes an application, involving the inherent jurisdiction of the Court for an order that the action be stayed on the ground of *forum non conveniens*, because this Court is not the natural and appropriate forum for trial.

Held:

[1] the Court in this sort of case looks first to see what factors there are which connect the case with another forum. If the Court concludes that there is another available forum which, on the face of it, is clearly more appropriate for the trial of the action, it will ordinarily grant a stay, unless there are circumstances by reason of which justice requires that a stay nevertheless not be granted. This principle is applicable whether or not there are other relevant proceedings already pending in the alternative forum.

[2] after considering all the factors the Court finds that Sabah is the natural and more appropriate forum.

[3] the plaintiff has satisfied the Court that it would not be just to grant a stay except on terms. Justice will be done if the action is stayed, leaving the plaintiff to pursue his claim in the natural and more appropriate forum, if but only if the defendant is prepared to pay the plaintiff's costs incurred in the action down to the grant of the stay.

[4] the Brunei Court ought to accept the most recent guidance given by the House of Lords as to how the discretion to grant a stay in a case such as this ought to be exercised.

[Stay granted on terms.]

Cases referred to:
The Spilliada [1986] 3 All ER 843
de Dampierre v. de Dampierre [1987] 2 All ER 58
Aerospatiale Case [1987] 3 WLR 59

For the plaintiff - Irene Appaduray; M/s. Shelley Yap & Irene Appaduray
For the defendant - Cyrus V. Das (Raynold Gaik with him); M/s. Ho & Siong Advocates

JUDGMENT

Gerald Godfrey JC:

The defendant in this action applies to the Court for an order, under its inherent jurisdiction, that the action be stayed on the ground of *forum non conveniens;* because this Court is not the natural and appropriate forum for the trial.

The plaintiff is a Malaysian firm. It is the holder of a licence from the government authority for the extraction of sand and coral stones from the sea off Petagas, Penampang, Sabah, Malaysia.

The defendant resides and carries on business in Brunei as the sole proprietor of a shipping and trading company.

The dispute between the plaintiff and the defendant arises out of an agreement in the chinese language dated 29 March 1985. The plaintiff says that this was an agreement made between the plaintiff and the defendant. The defendant says that the agreement was made between the defendant and one Chin Ching Yee. However, for the purposes of the present application, I shall treat this agreement as having been made between the plaintiff and the defendant.

Under the agreement, the defendant was to extract sea sand from the sea off Petagas on the terms therein contained.

But things went wrong. The defendant says that the agreement did not identify with sufficient certainty the concession area to be worked by the defendant. The defendant says that it was asked to work on a concession area pointed out to the defendant by Chin Ching Yee, and, acting on that, the defendant mobilised machinery and manpower to commence dredging operations in that area. But the dredging operations revealed that there was insufficient sea sand or stone in the site for extraction purpose and it was largely a mud bed.

Further, the defendant contends that by the agreement, the plaintiff impliedly warranted that the concession area would have sufficient quantity of sea sand or stone to be commercially workable. The concession area was not workable because it did not contain such sufficient quantity; in the result, says the defendant, the plaintiff breached an implied term that went to the root of the contract, and the defendant is accordingly discharged from further performance of the agreement.

Finally, the defendant contends that the agreement is *void* for illegality under the laws of Sabah.

The writ in the action was issued on 16 June 1987. Since the defendant was resident in Brunei and carrying on business here, the institution of these proceedings in Brunei was a perfectly proper and indeed sensible course for the plaintiff to take. On 29 July 1987, the plaintiff obtained judgment in default of appearance. On 3 September 1987, the judgment, on the application of the defendant, was set aside. On the same date, the defendant filed a defence. On 10 September 1987, the plaintiff filed a reply. On 15 October 1987, the defendant filed this present application for a stay.

The plaintiff, naturally, does not want his action stayed. His first point is that it is too late now for the defendant to object to the jurisdiction of this Court; the defendant has entered an unconditional appearance and indeed has put in a defence. This is all perfectly correct but absolutely irrelevant. The defendant does not object to the jurisdiction of this Court. He accepts that the Court has jurisdiction to deal with and take cognizance of the plaintiff's claim. The plaintiff is correct in contending, as he does, that the defendant has submitted to

the jurisdiction. Indeed, it is in fact the jurisdiction of this Court that the defendant invites the Court's inherent jurisdiction to stay the action. Whether it would be right at this stage for the Court to accept that invitation is another matter altogether, to which I shall come in due course.

The plaintiff's second point is that the defendant has failed to show that the action is vexatious or oppressive or otherwise an abuse of the process of the Court, and that, accordingly, the action should not be stayed. I agree that the defendant has not shown any of these things. But, in my judgment, that is not the principle on which my discretion to stay or not to stay the action ought to be exercised. It used to be, but is no longer, the principle: see *The Spiliada* [1986] 3 All ER 843.

Under the principle now applicable, the Court in the sort of case looks first to see what factors there are which connect the case with another forum. If, on the basis of that inquiry, the Court concludes that there is another available forum which, on the face of it, is clearly more appropriate for the trial of the action, it will ordinarily grant a stay, unless there are circumstances by reason of which justice requires that a stay nevertheless not be granted. This principle is applicable whether or not there are other relevant proceedings already pending in the alternative forum. (A recent statement of the principle is to be found in *de Dampierre v. de Dampierre* [1987] 2 All ER 58, per Lord Goff of Chieveley, at p. 67, c-g.)

The plaintiff says this may be the law of England but it is not the law of Brunei. I do not accept this submission. The matter is one of discretion. The Brunei Court ought, in my judgment, to accept the most recent guidance given by the House of Lords as to how the discretion to grant a stay in a case such as this ought to be exercised. In a similar (though admittedly not identical) field, the discretion of the Brunei Court to grant an injunction to restrain proceedings elsewhere, the Judicial Committee of the Privy Council has advised that no material distinction is to be drawn between the law of Brunei and the law of England: see the *Aerospatiale* case [1987] 3 WLR 59, at p. 23, C-D.

It would be most unsatisfactory, in these circumstances, if the principles on which the discretion to grant or refuse a stay falls to be exercised were held to be different in Brunei from the principles applicable in England absent some good reason for so holding, and in my judgment there is no such good reason; certainly no such good reason was suggested to me. On the contrary, the recent cases on this branch of law show that the common law of England is capable of modern restatement, and it would be a thousand pities if the law of Brunei was adjudged to be fossilized in some particular stage of growth without any such prospect of development.

So I turn to the two questions which I believe I consider. These are:

(1) Has the defendant satisfied me that Sabah, not Brunei, is the natural and more appropriate forum for the trial of the plaintiff's claim?

(2) if so, has the plaintiff satisfied me that it would nevertheless be unjust to stay the Brunei action?

As to question (1), the facts appear to be, on the one hand, that the plaintiff comes from Sabah; the agreement was made in Sabah and fell to be performed in (or rather off) Sabah (in Malaysian territorial waters) so that the law of Sabah would seem to be the proper law of the contract; there will have to be an inquiry at the trial as to the area which is land (or sea) which was identified by the agreement, which is land (or sea) off Sabah and not Brunei, all the defendant's witnesses (other than the defendant himself), reside in Sabah, and some of

them are Sabah government officials. On the other hand, the defendant, against whom any judgment in Sabah will have to be enforced, resides and carries on business in Brunei. I regard this last factor as an important one, militating against a stay; but it would, I think, be wrong to treat it as decisive and indeed I find that, when weighed in the scales with the factors I have listed in support of a finding that Sabah is the natural and more appropriate forum, the defendant has satisfied me that the balance clearly comes down in favour of Sabah.

So I turn to question (2). The plaintiff has satisfied me that it would not be just to grant a stay except on terms. The plaintiff had every right to bring his action in Brunei, and indeed I suppose he could not have brought it in Sabah without getting leave to serve the proceedings out of the jurisdiction. The pleadings in the action are closed. There are no further procedural steps which have to be taken before the trial; even discovery is not automatic in Brunei.

I do not know that costs the plaintiff has incurred in taking the action this far, but they must be fairly substantial. In my opinion, justice will be done if I stay this action, leaving the plaintiff to pursue his claim in the natural and more appropriate forum, if but only if the defendant is prepared to pay the plaintiff's costs incurred in the action down to the grant of the stay.

I propose therefore to invite the defendant (who is the person seeking the indulgence of a stay) to submit to an order undertaking to appoint Sabah lawyers to accept service of any proceedings the plaintiff may institute in Sabah and providing for the immediate taxation and payment of the plaintiff's costs of this action down to the date of the order, including all the plaintiff's costs of the defendant's application for the stay. If the defendant notifies the Registrar in writing, within 14 days from today, that he is willing to submit to such an order, a stay will be granted on these terms. If he indicates that he is not so willing, or fails to give the notification to which I have referred within the time prescribed, there will be no stay.

The order, if the stay is granted, must include a provision that the plaintiff is to be at liberty to apply to lift the stay if so advised. The purpose of this is to ensure that the defendant does not abuse the stay by attempting to hinder or delay the prosecution by the plaintiff of any proceedings he may institute in Sabah.

Also found at [1988] 2 CLJ 883